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NO. 89-791



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

CHARISSE MCGEE,

Petitioner,

v.

INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF CALIFORNIA, SECOND APPELLATE DISTRICT

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## ISSUES PRESENTED

1. Was the Respondent's, the Interinsurance Exchange of the Automobile Club of Southern California, [herein the "Insurer"] MOTION FOR SUMMARY JUDGMENT, granted by the Superior Court, Department 82, Judge Miriam Vogel, on Novembere 13, 1987, in favor of the Insurer, and affirmed by the Court of Appeal, Second Appellate District, Division One, on March 30, 1989, in error as to the following issues:

1. Is the "resident relative" exclusion in petitioner's policy, K739748, of auto insurance, Part I, Exclusion (f), unconstitutional, pursuant to the California Constitution, Article 1, Sec. 11, and the U.S. Constitution, Fourteenth Amendment, a violation of equal protection, based as it is, on the obsolete "parental

immunity", and the equally obsolete "guest statute"?

2. Does a ten-year old waiver of uninsured motorist coverage, never again verified by the insurer, violate Fourteenth Amendment constitutional due process and equal protection, if it is applied to a person who was a child of 12 years when it was signed by her parent, and who purchased her own car 10 years later and insured it under the family policy, without knowledge of the existence of the waiver?

3. Did the Insurer have a duty to notify the petitioner of the existence of the 10 year-old waiver of uninsured motorist coverage in the family policy, a serious omission in the policy which Appellant reasonably believed to be present?

4. Did the Insurer have a duty to give notice and obtain a renewal of any

waiver of uninsured motorist after the family policy was replaced by June McGee, Appellant's mother, years later with a new policy which substantially increased the risk?

a. Did the Insurer have a duty to give notice and obtain a renewal of any waiver of uninsured motorist after a reasonable period of time, e.g. three years?

5. Does the Insurer have a duty to defend petitioner its primary insured, when said Insurer sues Appellant for Declaratory Relief under the policy?

a. Can the Insurer defend a third party and not petitioner, its primary insured, on the basis of her policy in an action brought by the insurer against both of them?

6. Can the Insurer provide a law firm to a third party to defend said party against the Declaratory Relief action brought by the Insurer against him, and then when this law firm clearly in a conflict of interest fails to respond to the Insurer's Motion For Summary Judgment, and the lower Court on the basis of that default, declares that the Insurer does not have to defend the third party, can the Insurer declare that it has no duty to defend Appellant, its primary insured, either?

7. Was the lower Court in error in granting summary judgment without allowing petitioner to amend on a disputed fact: as to whether or not Appellant's mother did reinstate her uninsured motorist coverage at the time she graduated from law school? [denied by insurer].

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF CALIFORNIA, SECOND APPELLATE DISTRICT

PETITIONER HEREBY PETITIONS that a Writ of Certiorari be issued to review

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the Order of the Supreme Court of the State of California, S010003, filed June 21, 1989, which upheld the denial by the Court of Appeal For the Second Appellate District, dated March 30, 1989, B33480, of petitioner's appeal from a summary judgment entered against Petitioner, defendant, in the Superior Court of L.A. County, Case No. C573830.

The Hon. Sandra D. O'Connor, Associate Justice of the Supreme Court of the United States extended the time for time for filing this petition until October 19, 1989, A-203.

OPINIONS BELOW:

The Opinion of the Court of Appeal is App. A, attached hereto. The Order of the California Supreme Court denying Review is App. B attached hereto.

JURISDICTION:

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

STATUTES INVOLVED:

The Fourteenth Amendment to the United States Constitution, and the California Insurance Code, Sec. 11580.1(c)(5), .2, and Vehicle Code, Sec. 16451, 17158.

STATEMENT OF THE CASE:

Petitioner Charisse McGee is a state-licensed cosmotologist, graduated from Pasadena City College in 1984, andpresently unemployed. She was insured by a policy of auto insurance with the Respondent Insurer herein. Her policy was part of a family policy taken out by her mother, June McGee, in 1983. June McGee is Petitioner's lawyer.

In 1973, when Charissse was 12 years old, her mother signed a waiver of uninsured motorist coverage. She was not told, and the policy did not state, that the waiver would extend indefinitely. At no time for ten following years did the

Insurer ask for a renewal of the waiver or mention it when the policy came up for reconsideratin or renewal.

Subsequently Charisse became of legal age, and using her own earnings, purchased a used 1966 Mustang for herself and insured it under the family policy, K739748, paying for the premiums with her own money. The Insurer knew that Petitioner was insuring her own personally owned vehicle, but it did not ask her for a waiver of uninsured motorist coverage, nor did it notify her that she was subject to such a waiver, signed years ago by her mother when Charisse was 12 years old.

In 1977, June McGee graduated from law school and asked for an entirely new policy: inter alia, she greatly increased the coverage, from the minimum, $10,000, up to $100,000/$300,000, and changed the risk in every way. She also

asked that uninsured motorist coverage be restored. This all was accomplished on the phone with her agent, and unknown to her, the uninsured motorist coverage was not added to the policy declaration. Instead of adding such coverage as requested, the Insurer held onto the old 1973 waiver. The large increase in the premium due to the increased liability coverage obscured the fact that the new premium did not cover uninsured motorist.

Then, on March 1, 1983, near midnight, in the desert outside Thousand Palms, in Riverside County, Charisse McGee and her friend, Byron Pedersen, were involved in an accident, wherein he was driving, and she was the passenger in her own car. On a dark road, totally unmarked and without any notice of curve or lighting, Pedersen failed to negotiate a sudden curve and "straightened out the road", striking a tree stump by the side

of the road. The car turned over several times and was totally destroyed. Charisse was thrown out through the windshield, suffering serious and permanent injuries, particularly to her right foot. Residual pain from this injury means that she may not be able to continue her career as a cosmotologist. Pedersen, the driver, incurred minor injuries: a broken nose, abrasions, bruises, etc. He was not thrown from the car.

Charisse then sued the County of Riverside for failing to provide adequate lighting, signing, or any notice of the sudden curve, McGee v. County of Riverside, Indio case number 158917. The County cross-claimed against Pedersen for indemnity. Pedersen, who was totally uninsured, promised to pay Charisse for the loss of her car. When he failed to make a single payment, she sued him.

Both cases were consolidated in the Indio Court.

At this point Insurer, Respondent herein, dropped Charisse's insurance coverage from the family policy on the grounds that she was driving her car at the time of the accident, in spite of all the evidence to the contrary, including Pedersen's admission at his deposition. It also told her she had no coverage under her policy because of the "family exclusion" clause, and it stated that there was no uninsured motorist coverage.

It denied that June McGee had asked for said coverage years prior, and insisted that not only was the old 1973 waiver still in effect, but that it applied to Charisse McGee's car and policy. [Charisse McGee is the legal owner of her own car.] In addition, the insurer refused to provide Charisse McGee with any legal representation or support

in her claim against the County of Riverside, but under a "reservation of rights", the insurer provided Pedersen, who was totally uninsured except derivatively through Charisse's policy, with two law firms, David Silverton, Esq., to to defend him against the County of Riverside, and another law firm to defend him against the suit of Petitioner Charisse McGee. Thus on the basis of her policy, over 20 years of premiums paid by the family to the insurer and no prior major claims ever made, the insurer provide Pedersen, the uninsured driver that Petitioner is suing for negligence, with two law firms to defeat her case, while she, the primary insured, received no assistance from her Insurer whatsoever.

Even though there were two law firms representing Pedersen who also sued the County of Riverside, his case, I42652,

was dismissed because of lack of diligent prosecution. The lawfirm provided by Charisse's policy, 20 years of premiums, hired by the Insurer for Pedersen then tried to have Petitioner, Charisse's entire case against both Pedersen and the County of Riverside dismissed. Also, said law firm, hired by the Insurer, moved to have Petitioner's attorney removed from the case, falsely alleging that she represented Pedersen as his attorney at one time. The Superior Court in Indio held that this was not the case and denied their motion.

Appellant complained to the Insurer and asked that it cease providing two law firms to Pedersen, at the expense of her policy, to defeat her case while she, the primary insured, received no legal representation or help form her own insurer whatsoever. Respondent-Insurer refused to comply, insisting it had a

duty to defend Pedersen. The additional litigation caused to Petitioner by these two law firms was very costly and damaging. The matter went to the State Court of Appeal. [Fourth Appellate District, No. E 2161].

Then the Insurer-Respondent filed the instant case, a new and separate law suit against Petitioner, and June McGee, and against Pedersen for Declaratory Relief, once again forcing her, its primary insured, into more costly, time-consuming litigation. It was certainly not contemplated by Petitioner when she purchased a policy of auto insurance that her own insurer would sue her when she was the innocent victim of an accident. It seeks to avoid paying her anything on the basis of the "resident relative" exclusion and the old (1973) waiver of uninsured motorist. Now, after all the expense and trouble it put Petitioner to

by its providing Pedersen with two defense firms in the Indio case, it seeks a Declaration that it has no duty to defend Pedersen or to pay for Petitioner's injuries if he is held negligent in the Indio case. [Pedersen has now been held liable in the Indio case, and the Insurer herein refuses to pay his share of the judgment.

Petitioner maintains that she would be better off if she had had no insurance at all in this situation. She has received no benefit from it, and the Insurer has tried to destroy her personal injury case in Indio, and has brought the instant action against her, causing her more expensive litigation expenses.

Petitioner brought a complaint, McGee v. Exchange, Case No. C536820, against the Insurer, suing for bad faith and declaratory relief. Her motion to consolidate the instant case here on

appeal, Exchange v. McGee, C573820, with her bad faith case was denied, although the two cases concern the same basic issues. Hence, if the Order [appealled herein] for Summary Judgment in favor of the Insurer is upheld, not only will Petitioner receive no damages from the Indio case, but her case for bad faith will be greatly affected. Pedersen is a young man with something less than a high school education who is frequently unemployed.

Petitioner asked the Respondent-Insurer to provide her with independent legal representation in the instant case, wherein it sues her, June McGee, and Pedersen for declaratory relief. The insurer refused, and Petitioner moved to amend her complaint adding a cause of action for breach of duty to defend her, its primary insured. Once again the insurer provided

Pedersen with legal representation, the Silverton firm, in the instant case (as well as the Indio P.I. case), paid for on the basis of Petitioner's policy, while it provides her, the policyholder, with no representation whatsoever.

In the instant case, the Silverton firm, paid for and provided by the Insurer, filed an Answer for Pedersen, but then failed to file any response at all to the Insurer's motion for summary judgment. Said law firm is in an obvious conflict of interest. The lower Court, on the basis of this failure, granted Summary Judgment as to Pedersen, holding that the insurer had no duty to defend him and therefore no duty to defend Petitioner either. Since Pedersen's defense is derivative of Petitioner's policy, this holding means that the Insurer has no duty to defend its primary insured whenever there is a third-party

permissive driver. Petitioner maintains that this is a violation of the policy provision, "duty to defend".

On November 13, 1987, the Respondent Superior Court, Department 82, ruled in favor of the Insurer-Respondent in the instant case on its motion for summary judgment. The Court upheld the Insurer's position on the two chief issues: (1.) the "resident relative" exclusion was upheld as constitutional; that is, because Petitioner was a passenger in her own car, driven with her permission by a friend, she is ineligible to collect insurance if the driver is held to be negligent; and (2) that the ten-year old waiver of uninsured motorist was held to apply to Petitioner, a waiver signed by her mother when Petitioner was only 12 years of age, of which she had no knowledge and was given no notice when she bought her own car years later and

insured it under the family policy.

Further, the lower Court acknowledged that there was an issue of fact which is in dispute: Petitioner's mother reinstated uninsured motorist coverage after her graduation from law school when she completely changed the policy, greatly increasing the risk and coverage. The lower Court admitted the disputed fact, but still did not allow Petitioner the right to amend to provide missing details of the reinstatement of the uninsured motorist coverage.

In its original minute order the lower Court did not discuss the issue of the duty to defend, but the final Order it issued, stated that the Insurer has no such duty to either Pedersen or to Petitioner.

RELIEF REQUESTED:

That a PETITION FOR CERTIORARI be issued to the Supreme Court of California and

the Court of Appeals, California Second District, mandating:

That the Order For Summary Judgment be reversed:

1. That the resident relative exclusion clause [based upon Insurance Code Sec. 11580.1(c)(5)] in Petitioner's policy be held unconstitutional as a violation of Equal Protection; or in the alternative, that said exclusion does not apply to Petitioner, who is neither a relative nor a resident with Pedersen, the driver of her car;

2. That Petitioner be held to have coverage under the policy for uninsured motorist;

3. That both Pedersen and Petitioner are entitled to a defense by the Insurer in the instant case and in the Indio case;

4. That the policy does afford coverage to Petitoner on her direct

action for personal injuries against Pedersen.

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO SUMMARY JUDGMENT.

I.

THE FAMILY EXCLUSION CLAUSE IN DEFENDANT'S POLICY, PART 1, (f), DOES NOT EXCLUDE LIABILITY FOR BODILY INJURY SUFFERED BY CHARISSE MCGEE.

A. The "family exclusion clause", sometimes referred to as the "resident relative clause", is unconstitutional. Over 30 states now allow an intrafamily automobile negligence action. Unah By and Through Unah v. Martin, 676 P.2d 1366, 1367-68 (Okla., 1984); Farmers Ins. Group v. Reed, 712 P.2d 550 (Idaho, 1985). See Hollister, Parent-Child Immunity: A Doctrine in Search of Justification, 50 Fordham L. Rev. 489, 528-32 (1982).

1. Since November, 1983, every state which has considered intrafamily immunity

in the context of negligently caused automobile accidents and household exclusion clauses has allowed intrafamily suits in this narrow area and invalidated the exclusion clause in the insurance contract. The list includes Oregon, Wyoming, Ohio, Oklahoma and Colorado, inter alia.

2. The two factors supporting the intrafamily immunity are: (1) preservation of family harmony and (2) prevention of collusion or fraud. The argument as to preserving family harmony has been completely undercut today by the presence of mandatory automobile liability insurance.

"We feel that allowing an action, and subsequent recovery to the extent of the coverage under the automobile liability insurance, will enhance rather than disrupt family harmony." Farmers Ins. Group v. Reed, 109 Idaho 849, 712 P.2d

550, at 552, (1985).

3. The Oklahoma Supreme Court recently adopted this approach in responding to the family disharmony argument:

"Disruption of domestic tranquility is much less likely where the minor child can be compensated for his losses under the parent's liability coverage, which additionally eases any financial strain on the family resulting from the accident." "Unah, 676 P.2d at 1369. See also, Streenz v. Streenz, 106 Ariz. 86, 471 P.2d 282 (1970).

4. The analysis of the Idaho court in overturning the automobile guest statute was similar:

"The explanation may have had validity in 1931 when the guest statute was first enacted, but today, the widespread incidence of liability insurance has destroyed the basis for the

argument. Because of liability insurance, the statute [like the household exclusion clause herein] appears to result in the protection of insurance companies, not generous hosts, from lawsuits by negligently injured guests. The fact that insurance companies are the real beneficiary of the guest statute's protection is made clear by the second justification of the guest statute of prevention of collusive lawsuits which is discussed below." 712 P.2d 553. The Idaho court then gives examples of the uncertainty and unjustness imposed by the exclusion, e.g. if a family is making a trip on the freeway and a negligently caused accident occurs with the father at the wheel, all family members in the household receive no compensation from their insurance; but if a friend or relative, not a resident, is riding in the same car, he is covered

by the insurance; if the family friend riding with them slips behind the wheel, the liabililty coverage reappears; the Court points out that the protection for the family "fades in and out as family members move from car to car or switch from driver to driver." Id. at 554.

5. The argument that the intrafamily immunity doctrine is prevention of fraud or collusion is also rejected. The Idaho Supreme Court, in rejecting it, stated:

"We declined to let insurance companies hide behind the interspousal immunity shield. Implicit in respondent's argument is that the judicial system is inadequate to safeguard against collusion in tort actions between spouses. We reject this contention, for courts in this state presently weed out fraud and collusion in other cases not involving actions between spouses. We find nothing unusual or

peculiar in interspousal suits to frustrate the capability of the judicial system to avoid or anticipate such abuses." Id. at 553. See also, Mutual of Enumclaw Ins. Co. v. Wiscomb, 97 Wash.2d 203, 643 P.2d 441 (1982).

6. The Washington Supreme Court unanimously voided household exclusion clauses and stated:

"This exclusion becomes particularly disturbing when viewed in light of the fact that this class of victims [the family] is the one most frequently exposed to the potential negligence of the named insured. Typical family relations require family members to ride together on the way to work, church, school, social functions, or family outings. Consequently, there is no practical method by which the class of persons excluded from protection by this provision may conform their activities so

as to avoid exposure to the risk of riding with someone who, as to them, is uninsured." Wiscomb, 643 P.2d at 444.

7. The New Jersey Supreme Court has also spoken to the inequity of stripping family members of coverage but allowing it for everyone else:

"[T]here is something wanting in a system of justice which permits strangers, friends, relatives and emancipated children to recover for injuries suffered as a result of their driver's negligence but denies this right to the driver's spouse and minor children who are also passengers in the same vehicle." Immer v. Risko, 267 A.2d 481, 488 (N.J. 1970).

8. The Montana Court, in Transamerica Ins. Co. v. Royal, 656 P. 2d 820 (Mont. 1983), made its decision to reject the exclusion clause based upon the doctrine of parental immunity:

"If we recognize parental immunity, then the exclusion clause is valid; and vice versa, if parent-child immunity does not exist, then the exclusion clause must be invalid. . ." The Montana court then concluded:

"We hold that a parent is not immune from suit brought by his child under the age of emancipation in cases involving parental negligence in the operation of a motor vehicle. Consequently, we must hold that a family exclusion clause is void and unenforceable. . ." 656 P.2d at 824.

9. The Idaho Court concurred, "Therefore, the resolution of this case depends entirely on whether common law parent-child immunity exists under Idaho law." The Court held it did not. Reed, supra, at 555.

10. In California the doctrine of parental immunity has become "deadwood",

a "legal anachronism". Gibson v. Gibson, 3 Cal.3d 914, 92 Cal. Rptr. 288, 479 P.2d 648.

11. In California the doctrine of the guest statute has been rejected. Brown v. Merlo, 8 Cal.3d 855, 106 Cal. Raptr. 388, 506 P.2d 212, (1973). In Brown v. Merlo, the California Supreme Court, in rejecting the guest statute, which was part of Vehicle Code Sec. 17158, held: "The `collusion prevention' rationale similarly does not provide a sufficient basis for the statute's wholesale eliminmation of all automobile guests' causes of action for negligently inflicted injury." Id. at 872.

"Although, as noted above, early California cases tended to view the primary purpose of the section as the protection of hospitality. . .some commentators have suggested that the principal basis for such statutes has

always been the protection of insurers against fraudulent litigation.. . The political dynamics underlying the enactment of guest statutes throughout the nation appear to bear out the academics' position, for, as Professor Prosser reports, the statutes came into being in the late 1920's and 1930's as a "result of persistent and effective lobbying on the part of liability insurance companies." (Prosser, The Law of Torts (4th ed. 1971)." Id. at 873.

The California Supreme Court concludes: "We recognize that in testing the adequacy of the "collusion prevention" rationale in the instant case we must measure the guest statute's classification scheme against the relevant constitutional standards. The primary concern of the "equal protection" guarantee of our state and federl Constitutions, however, is that "persons

similarly situated with respect to the legitimate purpose of the law receive like treatment", and we believe that, just as in Emery, Klein and Gibson, the guest statute's wholesale elimination of causes of action fails to provide such "like treatment" for "similarly situated" individuals. Instead by broadly prohibiting all automobile guests from instituting causes of action for negligence because a small segment of that class may file collusive suits, the guest statute presents a classic case of an impermissibly overinclusive classification scheme, that is, a scheme in which a statute's classification "imposes a burden upon a wider range of individuals than are included in the class of those tainted with the mischief at which the law aims." [Authorities] Such a statute does not treat similarly situated in like manner, but instead

reaches out beyond the individuals "tainted with the mischief" at which a statute is directed, and imposes its burden on innocent individuals who do not share the condemning characteristics. [Authorities]. . . .We believe that in barring suits by all automobile guests simply to protect insurance companies from some collusive lawsuits, the guest statute exceeds the bounds of rationality and constitutes a denial of equal protection." Id at 877.

The Court in a footnote [18] then points out the irrationality of the statute's wholesale elimination of causes of action by the fact that there are alternative means which California presently employs to prevent the filing of such fraudulent claims. The Insurance Code imposes criminal sanctions for the filing of fraudulent insurance claims [Sec. 556] and the Penal Code [Sec.

118,126, etc.] for giving untruthful testimony or evidence in any civil action.

12. The insuring clause and the exclusionary clause are ambiguous and unclear and therefore void, pursuant to Veh. Code 16451. State Farm Mut. Auto. Ins. Co. v. Jacober, 10 C.3d 193; 110 Cal. Rptr. 1, 514 P.2d 953.

a. Relying on Jacober, supra, the preponderance of authority supports the interpretation that, with respect to the driver, a permissive user, the insured, Charisse McGee herein, would normally be considered covered by the policy, even though the policy is silent as to whose injuries are covered.

The policy requirements of the California Legislature are set forth in Vehicle Code Sec. 16451, "Owner's Policy":

"An owner's policy of motor vehicle

liability insurance shall insure the named insured and any other person using any motor vehicle registered to the named insured with the express or implied permission of the named insured, against loss from the liability imposed by law for damages arising out of ownership, maintenance, or use of the motor vehicle within the continental limits of the U.S. to the extent and aggregate amount, . . .of fifteen thousand dollars ($15,000) for bodily injury to or death of <u>each person</u> as a result of any one accident and, subject to the limit as to one person, the amount of thirty thousand dollars ($30,000) for bodily injury to or death of <u>all persons</u> as a result of any one accident and the amount of five thousand dollars ($5,000) for damage to property of others as a result of any one accident."

b. The <u>insuring clause</u> of

defendant's policy herein states:

"We will pay damages for which any person insured is legally liable because of bodily injury and property damage caused by accident and arising out of the ownership, maintenance or use of an automobile or utility trailer insured under this part."

c. The issue is: whose "bodily injury" is covered by the insuring clause? Reading the statute and the insuring clause together, proper since the insurance policy is intended to implement said statute, it is obviously implied that the "bodily injury" in the insuring clause refers to injuries to "each person as a result of any one accident" and to "all persons as a result of any one accident". State Farm Mut. Auto. Ins. Co. v. Jacober, 10 C.3d 193; 110 Cal. Rptr. 1, 514 P.2d 953, supports the interpretation that, with respect to

the driver, who is insured as a permissive user, the named insured would normally be considered to be included in the phrase "each person" injured or "all persons" injured as a result of any one accident. Jacober involves a case quite similar to the instant. A permissive user driving the owner's car negligently caused injury to the owner-passenger. The policy contained an exclusion clause like (f) in the instant policy. The court held that the insuring clause which agreed to pay for all liability resulting from bodily injury sustained by "other persons," provided coverage to a permissive user for injuries sustained by the owner of the car. The only difference between the insuring clause in Jacober and in this case is that the Jacober clause spelled out whose injuries were meant "other persons" whereas in the instant case, it is implied by reference

to the statute that these persons include "all persons injured as a result of any one accident." In either case the result is the same: the owner-passenger is among those persons whose damage claims against the drivers are covered by the insuring clause of the policy.

d. Jacober states that "the case must be examined from the point of view of the driver, who expects and demands protection in such an instance, it not mattering to him who the plaintiff is, but only that he has become liable to pay a judgment and needs the benefit of the insurance." Id at 200.

e. But in the instant policy, it is not clear that there is any coverage for the user driving with the permission of a "relative", therefore the permissive driver, as in Jacober, considering the policy from his point of view, might well conclude that, if he does have coverage,

and no one has denied this, he is the "you" referred to in the Exclusion clause (f). Because there is great ambiguity as to where, or if, the policy mentions coverage for such a user (driving with permission of a relative, not the named insured), there is a Jacober conflict between the insuring clause and the exclusion clause. The exclusionary clause of defendant's policy, withholding coverage for injuries to "you" is not "plain and clear" and is reasonably susceptible of a different interpretation by the driver, who is uncertain as to where his coverage appears in this contract at all. Jacober holds in this situation that "the fundamental principle is that an insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear. "As we have declared time and again, any exception to the performance of the basic

underlying obligation must be so stated as clearly to apprise the insured of its effect." Id at 201.

f. That the instant policy is ambiguous as to the coverage extended to the permissive driver is shown as follows:

Persons Insured-Part 1-include: (1) "you; (2) a relative; (3) any person using your insured automobile with your permission; any person who is legally resonsible for the use of the insured automobile by (1), (2), or (3) above." "You, your" is defined as the "insured named in item 1 in the declarations [only June McGee and Marvin McGee] and if the insured named is one person, the spouse if a resident of the same household." Therefore it appears that Pedersen, the user with the permission of Charisse McGee, the "resident relative", the owner of the vehicle, is not covered at all,

unless Charisse McGee can be interpreted as a "named insured", even though her name is not included in Part 1 of the Declarations. Otherwise coverage for Pedersen must be ascribed to common law agency principles.

Also this ambiguity in the coverage which excludes users who drive with the permission of relatives, not the named insured, is clearly too large a gap in the insurance policy to qualify under the current State public policy of mandatory insurance. Owners of automobiles who pay for insurance have a right to clearly know what and who is covered by said policy. They have a right to know that if they are a "relative" and lend their own car to anyone except another resident family member, they have no coverage.

g. Jacober holds that: "any interpretation which would deny coverage in the cases at hand would create a

serious and arbitrary gap in insurance protection. As a general principle, a California motorist can proceed with confidence that if he sustains injuries arising from someone else's negligent operation of a vehicle, he can obtain financial redress from the insurance policy covering that vehicle; if no such coverage exists, the injured motorist can recover under his own uninsured motorist protection.. . To deny recovery under the owner's policy, when he is injured by the uninsured driver of the owner's car, would be to create a class of persons who sustain injuries arising from the negligent operation of a vehicle, but are denied insurance protection for such injuries. This result would contravene the public policy recognized in Atlantic Nat. Ins. Co. v. Armstrong (1966) 65 Cal.2d 100, 106, 52 Cal. Rptr. 569, 416 P.2d 801, in which we stated that "A

primary purpose of financial responsibility laws is to protect "that ever changing and tragically large group of persons who while lawfully using the highways themselves suffer grave injury through the negligent use of the highways by others." This goal is no less subverted by limiting the class of persons whose injuries are compensable than by limiting the class of drivers who are insured." [65 Cal.2d at p. 106]

II.

A. Charisse McGee Was Not Injured by Either a "Family Member" or a "Resident Relative" and The Instant Case Does Not Fall Within The Policy Consideration Of The Resident Relative, "Family Exclusion" Doctrine. The rationale of preventing family disunity and possible collusion or fraud by resident family members against the insurer is totally inappropriate. Charisse McGee was a passenger in her own

car, driven by Pedersen, a friend, not a family member or resident relative. In Hartford Acc. & Indem. Co. v. Goosler (1978), 84 Cal. App. 3d 649, 148 Cal. Rptr. 784, a paramour of the named insured's daughter, openly cohabitating with the daughter, was not a "relative" for purposes of the policy defining "relative" as a person related and resident and providing uninsured motorist coverage.

1. This fact clearly distinguishes this case from Farmers Ins. Exchange v. Cocking, 29 Cal.3d 387, 173 Cal. Rptr. 846, upon which the insurance company herein relies heavily. In Cocking the dispute was between a named insured and a relative who resided in the same house [husband and wife]. The entire holding in Cocking is devoted solely to "family member liability coverage." Id. at 390. Even the Cocking court recognized the

situation of owner-passenger as being different from the husband-wife situation in that case, citing Cooper v. Bray, 21 Cal.3d 841; 148 Cal. Rptr. 148; 582 P.2d 604, and distinguishing it by stating that: "Cooper's holding was directed solely to the propriety of the substantive immunity granted to negligent drivers vis-a-vis owner-passengers under Veh. C. Sec. 17158. As we explain below, no similar grant of immunity from suit is here involved."

B. The legislative and statutory support for the exclusion as applied in the instant case is not Insurance Code 11580.1, but rather Vehicle Code Sec. 17158, which states that no owner can sue a permissive driver of his car for his injuries while a passenger in his own car. However Sec. 17158 has been held by the California Supreme Court to be unconstitutional and to violate the equal

protection clause of the state and federal Constitutions. Cooper v. Bray, 21 Cal.3d 841; 148 Cal. Rptr. 148; 582 P.2d 604.

1. In Bray the owner of a vehicle sued a permissive driver for injuries she sustained while a passenger in her car. It was held that the trial court acted properly when it instructed the jury on ordinary negligence principles and refused to to give instructions pursuant to the statute [Veh. C. 17158]. The Court went on to analyze the statute as to public policy and equal protection implications, finding that such a ruling which gave blanket immunity to negligent drivers without insurance of their own, violated public policy and equal protection standards of both constitutions, State and federal.

C. Defendant Charisse McGee herein maintains that the Bray case is totally

in point with the instant case; that if the Supreme Court of California has found that the State statute is unconstitutional which mandates the same result as the exclusion clause in her policy, then the exclusion clause, being a produc of the same rationale, involving the same relationship, is also unconstitutional.

In Cooper v. Bray, supra, the Court ruled, not on the merits of the underlying insurance code provision, Section 11580.1(c)(5), but on the state statute, Vehicle Code 17158, which disallowed any lawsuit against a permissive driver by an injured owner-passenger. However the Court investigated and considered on the merits whether or not the singling out of one narrow class, injured owner-passengers, bears any rational relationship to a realistically conceived legislative

purpose. The Court held that such disparate treatment violated the State and federal equal protection guarantees.

Petitioner submits that this same analysis applies to the issue of whether or not it is a violation of equal protection for the insurer to avoid coverage for injuries suffered by that same narrow class, owner-passengers.

When the guest statute was declared unconstitutional by the California Supreme Court, the Court determined that guests should be treated on an equal basis with other persons injured through the negligence of the driver. In Bray the Court determined that an owner-passenger should not be singled out for differential treatment from any other guest. As the Opinion of the Court of Appeals states [p. 7]: "The court could find no other way in which the disparate treatment accorded by the statute was

rationally related to a realistically conceivable legislative purpose, so it held the statute [Veh. C. 17158] unconstitutional, violating the state and federal equal protection guarantees."(Id. at pp. 851-855.)

Yet here we have the Appellate Court still upholding another remanent of the old guest statute which violates the principle enunciated in Brown v. Merlo, (1973) 8 Cal. 3d 855, 106 Cal. Rptr. 388. (1973), that passengers should be treated equally with other injured persons.

The Appellate Court herein states that this differential treatment is not in violation of public policy because the clause "does not involve immunity from a personal injury lawsuit based upon negligence." p. 10. In other words innocent injured owner-passengers can still sue the negligent driver, but the insurer will not pay the judgment if the

individual driver, as here, is judgment proof.

D. Petitioner maintains that this is a violation of the basic public policy, expressed in Civil Code section 1714, subdivision (a), making every person responsible for his own negligent acts. "Responsible" means "accountable" and "able to pay debts or meet business obligations." Webster's New World Dictionary, College Edition. This is the whole purpose and rationale behind mandatory insurance policies in this State. It is not enought to be merely "answerable".

E. This family exclusion clause is also in violation of California's financial responsibility and civil liability provisions in the Vehicle Code, sections 16000-480 and 17150-154, whose purpose is to protect users of the highway by assuring that owners have a

certain financial responsibility to those injured.

Furthermore the legislature assures liability insurance, though at a high rate, for any automobile owner whose coverage has been cancelled by his insurance carrier. Additionally, all automobile policies must include coverage for anyone who drives the owner's vehicle with the owner's permission. Cal. Veh. Code Sec. 16451.

Why then should the owner be denied coverage because she was riding in her own car as a passenger? Again the opinion of the Appellate Court herein states the old rationale of collusive actions by family members in fraud against the insurer. This is the same old argument that was discredited when the guest statute was declared unconstitutional. Also "the possibility that fraudulent assertions may prompt

recovery in isolated cases does not justify wholesale rejection of an entire class of claims in which that potential arises." Dillon v. Legg, (1969) 68 Cal. 2d 728, 69 Cal. Rptr. 72.

When it is pointed out that in the instant case, there is no relationship between the actual driver, Pedersen, and petitioner, Charisse McGee, of relative or of resident, then the Appellate Court reasons:

"But collusion between friends to defraud one's insurance

company is not unheard of." p. 11.

Petitioner submits that this extends the coverage or lack of coverage of the resident relative exclusion way, way beyond the legislative intent as well as the actually contractual provision of the policy, which is limited to "relatives" who "reside" with the insured.

F. The resident relative exclusion

from insurance coverage is incongruent with California's system of tort law, which is guided by a policy goal of increasing the incidence of compensation for accidental injury. "The result of broadening liability is to increase the likelihood that people will buy insurance. This result is consistent with the purpose of the financial responsibility laws." California tort law is built on a fault-based foundation. Although other jurisdictions have adopted no-fault automobile compensation systems, California has rejected them. Li v. Yellow Cab Co. 13 Cal. 3d 804, 119 Cal. Rptr. 858, confirmed the California position that "in a system in which liability is based on fault, the extent of fault should govern the extent of liability." Id. at 811. Moreover, the exclusion violates the level of reason and fairness Li sought to

obtain because the owner-passenger exclusion does not equate liability with fault. Rather the owner-passenger exclusion from insurance coverage operates to excuse the driver's negligence to the passenger if the passenger happens to own the car. Petitioner says "excuses" because coverage would increase the premiums for the car owners.

1. Increased incidence of compensation is a polilcy goal: witness a landmark case, Rowland v. Christian, (1968) 69 Cal. 2d 108, which did away with old distinctions between entrants upon land.

2. The owner-passenger exclusion penalizes those prudent owners of autos who, for reasons of safety, turn over the driving to another person. In those cases in which an owner has been drinking and requests a sober frined to drive him home

or in which the owner and a friend share the driving, the owner-passenger becomes an endangered individual. Furthermore, in cases in which the owner reliquishes the driving to an automobile serviceman or mechanic, the owner is unprotected against the driver's ordinary negligence.

The unfairness of the exclusion is most obvious when one considers that in the instant case, if their positions had been reversed, if Charisse had been the driver and her friend Pedersen the injured party, he could have collected against her policy with no trouble whatsoever.

G. Insurance Code Section 11580.1(c)(5) is unconstitutional, in violation of equal protection and overly broad. Not only does it exclude owner-passengers, and family members driving together, parents and children, but it also penalizes owner-passengers in

which the owner is sick, senile, incompetent, does not know how to drive, is injured, drunk, or tired and asks another to drive for him.

H. As for the Appellate Court's argument that the insurance provision for resident relative exclusion is valid as an expression of the right of the insurer to contract with its clients, the obvious answer is that very, very few persons are aware of such an exclusion from their policy coverage, even though the practice of relatives driving together is very common and wide-spread. Beyond question, this is a matter, not of arms's length negotiation, but of a contract of adhestion.

III

Charisse McGee's uninsured motorist coverage was in effect at the time of the accident.

A. The policy in question here dates back to approximately 1963 at which time it had uninsured motorist coverage. In 1973 June McGee, the primary named insured, signed a waiver of uninsured motorist coverage. Years later after graduation from law school (1977) she orally cancelled the old contract of insurance and made a very large increases anc changes in the terms and coverage, including requesting reinstatement of uninsured motorist coverage.

1. This change of policy constituted non-acceptance of the old contract and a new offer to contract by the named insured, June McGee, to the insurer. Civil Code Sec. 1585 holds that an acceptance must be absolute and

unqualified. "A qualified acceptance is a new proposal." When the insurer sends its request for annual premium payment, this is an offer to continue. In this case, the offer was not accepted and June McGee made a counter offer, which the insurer accepted. It terminated the old contract and, with it, the continuation of the waiver.

B. The Waiver Itself States That Uninsured Motorist Coverage Is Deleted Only Through Any "Renewal" of the Policy. It is well established that the terms of the contract itself control. In this case, on its face the waiver states: "By mutual agreement of the undersigned named insured and the Exchange, Uninsured Motorist Coverage (coverage F) is deleted from the policy and any renewal thereof." It does not mention "replacement" or any of the new terms as added in 1983, ten years later,

to Insurance Code Sec. 11580.2 (a)(1), third sentence, e.g. ". . or with respect to any other policy which extends, changes, supersedes, or replaces the policy insured. ." Plaintiff maintains that this express term of the waiver contract represents the understanding of the parties and controls. When there was no "renewal" of the old policy on the same terms, the continuation of the waiver ceased and it terminated.

C. The waiver by its express terms states that it refers to the old contract as it stood in 1973 which is to remain "unchanged".[See next to last sentence of waiver, Endorcement attached to insurer's brief] Because the insurer is relying on a contract which was ten years old at the time of the accident, and which was never renewed or even mentioned by any notice for ten years, it may be argued that the

terms of the Insurance Code as they applied to termination in 1973 apply to it. The wording of Ins. Code Sec. 11580.2, upon which Insurer relies, the third sentence of the Section, was amended in 1983, ten years later. It was changed from "Such agreement . . .shall continue to be so binding with respect to any continuation, renewal or replacement of such policy" . . .to the present wording which adds "or with respect to any other policy which extends, changes, supersedes, or replaces the policy issued to the named insured by the same insurer, etc." It the old waiver remains in force, and arguendo, if the conditions of Ins. C. Sec. 11580.2 apply, said conditions in 1973 were that when there was an entirely new contract, when there was no longer a "continuance, renewal, or replacement" of the old contract, the waiver was no longer binding. June McGee's new policy after

graduation was no continuance, renewal, or replacement of the old contract. It was an entirely new policy and as such, cancelled the old contract and waiver.

1. Borders v. Great Falls Yosemite Ins. Co., 72 Cal. App.3d 86, 140 Cal. Rptr. 33, states that "a renewal of a policy of fire insurance is, in effect . . on the same terms and conditions as the original. 6 Couch on Insurance, Sec. 1365 et seq." But a contrct with a definite risk and in a larger amount "cannot, by any sound process of reasoning be held to constitute an agreement for renewal of an existing policy." In the instant case, there was definitely risk and a much larger amount.

D. Public policy favors uninsured motorist coverage. For such a waiver, which is contrary to public policy, to continue without notice for ten years is not reasonable and not in the public

interest. Further in this case such lack of renewal or notice of the waiver worked to the detriment of Petitioner Charisse McGee, who was 12 years old when the waiver was signed. She bought her own car and paid for her own insurance, and was unaware that she was not covered by uninsured motorist insurance. "In a case where coverage could be continued by someone other than the named insured, as by a legal owner [Charisse McGee in this case] at the cost of the insured, a new coverage is required because otherwise the named insured has no opportunity to procure uninsured motorist coverage." Borders, 29 Cal.App.3d 86.

E. The insurer had a duty because of public policy favoring such coverage to affirm the waiver at least three times in ten years prior to the accident: (1) when June McGee took out a new policy after graduation (1977); (2) when Charisse

became of age and bought her own car and insured it under the family policy; (3) as a matter of contract law, at a reasonable time for termination of the contract.

1. When Charisse purchased her own car, she became more than a resident relative; she became a constructive "named insured", entitled to have the option of knowing about her uninsured coverage and affirming or rejecting it herself. Charisse McGee should not be deprived of her right to select uninsured motorist coverage by a waiver of which she had no notice, which was signed by her mother when she was 12 yers old; this is a constitutional violation of due process and equal protection and void as against public policy. She was entitled to make a "knowing" waiver of important rights. Delos v. Farmers Ins. Group, (1979) 93 Cal.App.3d 642, 155 Cal. Rptr. 843.

2. The insurer had a duty to notify

Charisse McGee of the fact that there was a waiver of the uninsured motorist coverage when she took out the policy initially. This was a key exclusion. In an area where there are many instances of uninsured drivers involved in accidents it was vital to Charisse McGee that she be aware that she did not have uninsured motorist coverage. Therefore pursuant to Aetna Cas. & Surety Co. v. Velasco, 194 Cal. App.3d 1441, the insurer had a duty to notify her at the time of the issuance.

F. The Appellate Court has not decided on the issue of the validity of the waiver, a fact in dispute, but says there is no uninsured motorist coverage because "even if the waiver was invalid, the uninsured motorist provision did not cover Charisse's injuries." It is saying that the auto was insured, but that the resident relative exclusion applies to

the uninsured motorist coverage as well.

Aside from the dispute over the validity of the resident relative exclusion, petitioner wishes to point out that all the same arguments apply to its use as a condition of the uninsured motorist. That is, Charisse had a right to know whether or not she carried uninsured motorist coverage, and whether it was excluded by a valid waiver or by the resident relative exclusion makes no difference, she still should have had the option of adding this coverage or deleting it. The insurer had a duty to so inform her at the time her auto was added to the family policy and if she decided to not carry it, to obtain her personal refusal in writing.

Also whether or not there was a waiver in effect at the time is a disputed fact, because June McGee did attempt to reinstate it after graduation

and fully believed uninsured motorist coverage was in force.

IV

THE CONTRACT DUTY TO DEFEND PEDERSEN IS VOID FOR UNCERTAINTY.

A. Said duty and any exclusions must be clearly stated, Jacober, supra, or they are void for uncertainty. The Court in Farmers Ins. Exchange v. Frederich, (1966) 244 Cal. App. 2d 776, held that it is the resident relatives of the actual driver who are excluded by the resident relative clause. The purpose of the exclusion is to prevent collusion. But in the instant case, if an actual resident relative of Pedersen's had also been an injured passenger in Charisse's car, this relative under the policy, unlike Charisse, would not be excluded.

CONCLUSION:

The holding of the lower court in the instant case is unreasonable and restores

the outdated notion that an automobile confers a mystical status upon its occupants. The resident relative exclusion, besides being vague as to whose relatives are involved, the permissive driver's or the named insured's, suffers from the same inconsistencies as did the old guest statute.

The lower Court overlooks entirely the fact that this case is clearly not in point with Cocking, upon which it relies. That case involved true "resident relatives", a husband and wife, living in the same house. Here defendant Charisse McGee is not a relative of the driver, Pedersen, nor resident with him. The entire rationale for the resident relative exclusion is missing here.

The resident relative exclusion itself, even when it applies, is an obsolete doctrine drawn up by insurance

companies for their own benefit at the expense of insureds. It is an attempt by the insurer to escape liability for one of the most common situations, occurring millions of times every day, relatives driving together in the same car.

The insurer's argument to escape liability in every case, that there may be collusion, should be rejected. The insurer can always allege collusion between driver and passenger. It should not be allowed to deny recovery to injured parties, its policy holders, who pay for protection, on the bald unsupported statement that there "may be collusion". The insurer should not be allowed to escape its burden of proof, of showing to a court of law that there is "collusion" before being excused from liability. This is doubly true in the instant situation where an innocent person is injured, a passenger, who

without insurance has no remedy other than this court.

The resident relative exclusion, based upon an obsolete intrafamily immunity doctrine and an equally obsolete "guest statute", violates basic "equal protection" before the law. If Charisse had not been the owner of the car, but merely another friend taking a ride with Pedersen, there is no question she could have collected on the policy for her injuries.

This "resident relative" exclusion has no rational application in the instant case and is a relic, held unconstitutional in at least 30 other states which have considered the matter todate. Petitioner respectfully asks this Court based upon the above to issue a Petition For Certiorari.

Oct. 14, 1989 June McGee

JUNE MCGEE, ATTORNEY FOR PETITIONER

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB OF SOUTHERN CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CHARISSE MCGEE et al.,<br><br>Defendants and Appellants. | No. B033480<br><br>Super. Ct. No. C573830<br><br>FILED MARCH 30, 1989, ROBERT N. WILSON, CLERK |

APPEAL from a judgment of the Superior Court of Los Angeles County, Miriam Vogel, Judge. Affirmed.

June McGee for Defendants and Appellants.

Gilbert, Kelly, Crowley & Jennett, Peter J. Godfrey and Tracy W. Goldberg for Plaintiff and Respondent.

## INTRODUCTION

Defendants Charisse and June S. McGee appeal from a summary judgment in favor of plaintiff Interinsurance Exchange of the Automobile Club of Southern California.1

## STATEMENT OF FACTS

On March 1, 1983, at about 12:00 a.m., defendant Charisse McGee (Charisse) was involved in an automobile accident near Thousand Palms in Riverside County. Charisse was a passenger in a 1966 Ford Mustang owned by her and driven by her friend Byron H. Pedersen (Pedersen). Pedersen failed to negotiate a curve, struck a stump by the side of the road and the Mustang rolled over several times. Charisse was thrown through the windshield and was seriously injured; Pedersen suffered minor injuries.

The Mustang was insured under an

automobile insurance policy issued by plaintiff to defendant June S. McGee (June), Charisse's mother. June had obtained the policy in 1963. In 1973, June signed an endorsement waiving uninsured motorist coverage; at that time, Charisse was 12 years old. When

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1 Defendants purport to appeal from the minute order granting summary judgment, which is nonappealable, but we may treat the appeal as taken from the subsequent summary judgment. (Avila v. Standard Oil Co. (1985) 167 Cal.App.3d 441, 445; Snow v. A. H. Robins Co. (1985) 165 Cal.App.3d 120, 125.)



Charisse came of legal age, she purchased the Mustang and used her own money to insure it under June's policy;

plaintiff did not inform her she was subject to the waiver and she was not asked for her own waiver of uninsured motorist coverage.

In 1977, June graduated from law school. At that time, she claims, she asked her insurance agent for a new insurance policy with increased liability coverage and with uninsured motorist coverage restored. Instead, the old policy was renewed with increased liability coverage and no uninsured motorist coverage. The higher premiums for the increased liability coverage obscured from June the fact there was no uninsured motorist coverage under the policy.

After the accident, Charisse sued Riverside County for damages; the County filed a cross-complaint against Pedersen. Charisse also sued Pedersen when he failed to pay her for the loss

of her automobile, as he had promised to do. Plaintiff provided Pedersen with defense attorneys in both cases, which later were consolidated. This defense was subject to a reservation of rights based on a claim of noncoverage under the policy, however.

Plaintiff then brought the instant action against defendants and Pedersen, seeking a declaration it was not liable under the policy for Charisses's damages for bodily injury, and it had no obligation to defend Pedersen. It based its claim of noncoverage on an exclusion in the liability portion of the policy and the waiver of uninsured motorist coverage. In a previous summary judgment, it was declared plaintiff had no duty to defend Pedersen. In the instant summary judgment, the trial court ruled Charisse's damages for bodily injury were not covered under the

liability or uninsured motorist portions of the policy.

## CONTENTIONS

I

Defendants contend the family exclusion clause in the insurance policy does not exclude liability for bodily injury suffered by Charisse.

II

Defendants further contend Charisse McGee's uninsured motorist coverage was in effect at the time of the accident.

III

Finally, defendants assert plaintiff has a duty to defend Byron Pedersen.

## DISCUSSION

### I

Defendants contend the family exclusion clause in the insurance policy does not exclude liability for bodily injury suffered by Charisse McGee. We disagree.

Part I of the insurance policy covers liability for bodily injury and property damage. One section thereof is entitled "WHAT IS NOT COVERED - EXCLUSIONS - PART I." It reads, in pertinent part: "Under Part I, this policy does not apply to: . . . (f) liability for bodily injury to you, a relative or any person insured under this part . . . ."

"You" is defined as the insured named in Item 1 of the declarations here June S. McGee, and a resident spouse.

"Relative" is defined as "any person related to [the named insured] by blood, marriage or adoptions who is a resident of the same household in which [the named insured] reside[s]." "Resident or reside . . . means actually living in the household in which [the named insured] reside[s] and having the intention of continuing to live there." Defendants admitted Charisse is the natural daughter of June, her blood relative, and resided in the same residence as June at the time of the accident.

Defendants first contend exclusion clause (f), which they refer to as the "family exclusion clause" or "resident relative clause," is unconstitutional. In examining the constitutionality of this clause, two cases cited by the parties are key: Cooper v. Bray (1978) 21 Cal.3d 841 -- relied upon by

defendants -- and Farmers Ins. Exchange v. Cocking (1981) 29 Cal.3d 383 -- relied upon by plaintiff.

Cooper v. Bray, supra, 21 Cal.3d 841 involved an owner-passenger injured in an accident while her automobile was being driven by an unrelated permissive driver. In this respect, as defendants take pains to point out, Cooper is identical to the instant case. However, the identity ends there. The owner-passenger sued the driver for damages directly; no insurance coverage was involved. At trial, a dispute arose over the applicability of Vehicle Code section 17158, which provides: "No person riding in or occupying a vehicle owned by him and driven by another person with his permission has any right of action for civil damages against the driver of the vehicle . . . on account of personal injury to or the death of

the owner during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver." Based on a Supreme Court decision this statute was unconstitutuional, the trial court declined to instruct the jury pursuant to the statute but instead instructed on ordinary negligence principles. However, during the pendency of the trial, a rehearing was granted in the Supreme Court case, and the court subsequently ruled the statute was constitutional. (21 Cal.3d at pp. 844-846)

On appeal in Cooper, the Supreme Court again considered the constitutionality of Vehicle Code section 17158, addressing the questions whether the statute violated the equal protection clause of the state or

federal constitution by singling out one narrow class -- injured passengers who own the automobiles in which they are injured -- and barring them from recovery from permissive drivers who negligently cause their injuries. (Id., at p. 843.)

The statute was encacted to provide an owner-passenger would be treated in a similar manner to a "guest" in a vehicle, who had no right of action against the driver. (Id., at p. 849.) However, the "guest statute" was subsequently declared unconstitutional as a violation of equal protection. (Id., at p. 851.) Thus, Vehicle Code section 17158 no longer met the purpose of providing equal treatment but now defeated the purpose by singling out owner-passengers for differential treatment. (Ibid.) The court could find no other way in which the disparate

treatment accorded by the statute was rationally related to a realistically conceivable legislative purpose, so it held the statute was unconstitutional, violating the state and federal equal protection guarantees. (Id., at pp. 851-855.)

In Farmers Ins. Exchange v. Cocking, supra, 29 Cal.3d 383, defendant was injured while a passenger in an automobile driven by her husband and sued him for damages. Because the driver was a relative of the passenger, defendants in the instant case contend Cocking is inapposite. However, review of the case shows it is directly on point. Plaintiff in Cocking, which insured the husband, brought a declaratory relief action to avoid indemnifying the husband, based on an exclusion in the insurance policy providing the policy did not apply to

the liability of any relative of the named insured residing in the same household. (At p. 386.) This is exactly what occurred in the instant case.

Such an exclusion is specifically permitted by Insurance Code section 11580.1, subdivision (c)(5) (hereinafter section 11580.1(c)(5)) which provides the insurance afforded by a policy of automobile liability insurance may be made inapplicable to "[l]iability for bodily injury to an insured . . . " Defendant in Cocking contended section 11580.1(c)(5) violated public policy and was unenforceable for that reason (29 Cal.3d at p. 387), and it was irrational and arbitrary and violated the equal protection clause of the state and federal constitutions (id., at p. 389).

The Supreme Court noted the contention general public policy forbids

an insurer from excluding liability for bodily injury to an insured has been repeatedly rejected by it and the courts of appeal. (Id., at p. 387.) It specifically pointed out "nothing [it] said in Cooper casts any doubt on the validity of the exclusion authorized by section 11580.1(c)(5). Cooper's holding was directed solely to the proprietyy of the substantive immunity [from suit] granted to negligent drivers vis-a-vis owner-passengers under Vehicle Code section 17158. . . . [N]o similar grant of immunity is here involved." (Id., at p. 388, emphasis original.) And because section 11580.1(c)(5) does not provide immunity from suit, the court concluded it did not contravene the basic public policy of making every person responsible for his or her own negligent acts. (Ibid.)

Furthermore, inasmuch as public

policy regarding automobile liability insurance is that expressed in the Insurance Code (Ins. Code Sec. 11580.05), section 11580.1(c)(5) is itself an expression of public policy and, the court concluded, that policy is supported by a variety of rational legitimate purposes. (20 Cal.3d at p. 388.) The household or family exclusion has long been accepted "'to prevent suspect inter-family legal actions which may not be truly adversary and over which the insurer has little or no control. Such an exclusion is a natural target for the insurer's protection from collusive risks of liability.'" (Id., at p. 389.) Additionally, "[t]he freedom of the parties to exclude risks from an insurance contract is well extablished . . . '" (Ibid.) The court reiterated section 11580.1(c)(5) does not eliminate causes of action for an

entire class of persons but merely "exclude[s] one class from mandatory liability coverage, consistent with a preexisting judicial rule, founded upon freedom of contract and the insurer's legitimate interest in minimizing future losses attributable to fraud or collusion. These considerations fully satisfy the rational basis test." (Id., at p. 390.)

The court also noted family members are frequently covered by medical coverage provisions of the policy or by other medical or casualty insurance. (Id., at p. 390.) The Legislature may not have wanted to require the insured to purchase expensive liability insurance to cover injuries covered elsewhere. (Ibid.)2 Ultimately, the court held section 11580.1(c)(5) is constitutional. (Id., at p. 386.)

The instant case involves a family

exclusion clause in an insurance policy as permitted by Insurance Code section 11580.1(cOI5); under Cocking, the statute and clause are constitutional. The case does not involve immunity from a personal injury lawsuit based on negligence; the clause does not preclude defendants from suing Pedersen. Therefore, neither Vehicle Code section 17158 nor Cooper has any relevance here.

In addition to relying on Cooper to support their contention the family exclusion clause is unconstitutuional, defendants point out the doctrine of parental immunity and the guest statute have been rejected. While this is true, it is irrelevant here since immunity from suit is not involved. (See Cocking, supra, 29 Cal.3d at p. 388.) Defendants also claim the family exclusion clause is unconstitutional based on the fact "[o]ver 30 states now allow an

intrafamily automobile negligence action." Again, the clause does not prohibit such an action; it merely precludes certain insurer liability for bodily injury in such an action and may validly and constitutionally do so in California. (Ibid.)

Defendants also argue the rationale of preventing collusion or fraud disappears where, as here, the driver is not a family member or resident relative but a friend, distinguishing the instant case from Cocking on that basis. But collusion between friends to defraud on's insurance company is not unheard of. (See, e.g., People v. Scahill (1967) 250 Cal.App.2d 108; People v. D;Allesandro (1958) 163 Cal.App.,2d 559.)

Defendants further contend the family exclusion clause and the "insuring clause" are ambiguous and

unclear, and therefore void, pursuant to State Farm Mut. Auto. Ins. Co. v. Jacober (1973) 10 Cal.3d 193 and Vehicle Code section 16451. Again defendant' reliance in misplaced.

Jacober involved three cases in which the named insureds or their family members were passengers in their automobiles driven by permissive drivers who were not family members. The insurance policy at issue provided plaintiff agreed "'to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of (a) bodily injury sustained by other persons' . . . " (10 Cal.3d at p. 199.) Bodily injury subsequently was referred to as "'coverage A.'" (Ibid.)

The policy further provided "'the unqualified word "insured"'" included the named insured, resident relatives

and permissive drivers. (Ibid.) The policy then listed exclusions, stating the insurance did not apply under "'coverage A, to bodily injury to the insured or any member of the family of the insured residing in the same household as the insured.'" (Ibid., emphasis omitted.)

The court first noted Vehicle Code section 16451 requires that an automobile liability policy insure the named insured and any permissive users. (Id. , at p. 200.) The policy provided plaintiff would "'pay on behalf of the insured [for] bodily injury sustained by other persons. . . .'" (Ibid., emphasis original.) To a driver insured as a permissive user, "the named insured would normally be considered to be an 'other person'; his injuries therefore would be covered by the policy." (Ibid.) A policy must be construed to

protect an additional insured against a claim for injuries by a named insured unless such a risk is expressly and unambiguosly excluded. (Id., at pp. 200-201.) The court concluded the policy's "cryptic reference to 'other persons'" did not qualify as an express and unambiguous exclusion of coverage of claims by a named insured against an additional insured. (Id., at p. 201.)

With respect to the exclusionary clause, plaintiff claimed it was effective pursuant to Vehicle Code section 16454, which provides an automibile liability policy "' need not cover any liability for injury to the assured . . . .'" (10 Cal.3d at p. 201.) The court noted any exclusion "'must be so stated as clearly to apprise the insured of its effect.'" (Id,. at pp. 201-202.) The exclusionary clause "'must be conspicuous, plain and

clear'" and phrased in "'clear and unmistakalbe language.'" (Id., at p. 202, emphasis omitted.) The exclusionary clause at issue could be interpreted to apply to only the person facing potential liability and who claims the protection of the policy, to all insureds or to only the named insured. (Ibid.) In accordance with the rule an insurance policy will be interpreted if possible to provide coverage, the court chose the first of the three interpretations as correct, allowing the named insureds and their family members to claim coverage for their injuries under the policies. (Id., at p. 203.)

The insurance policy in the instant case contains different language than that at issue in Jacober and does not suffer from the same ambiguities. The "insuring clause" provides plaintiff

"will pay damages for which any person insured is legally liable because of bodily injury and property damage caused by an accident and arising out of the ownership, maintenance or use of an automobile . . . insured under this part." It does not cryptically specify whose bodily injurty is covered as did the clause in Jacober, which specified it covered "'bodily injury sustained by other persons.'" (10 Cal.3d at p. 199) Thus, it does not provide the same basis for a permissive driver to interpret the clause as covering injuries to another insured. Whose bodily injury is covered is limited only by the clearly stated exclusions.

The exclusionary clause does not refer merely to "'the insured'" as did the clause in Jacober. (Ibid.) Rather, the clause applies to "you, a relative or any person insured under this part."

"You" is defined as the named insured and his or her resident spouse, and "relative" is defined as a person related to the named insured by blood, marriage or adoption and residing with the named insured. Thus it is clear to whom the exclusionary clause applies, there is no ambiguity. Therefore, the insuring and exclusionary clauses are not ambiguous and void under Jacober and Vehicle Code sections 16451 and 16454.

It may be noted a similar conclusion was reached in California State Auto. Assn. Inter-Ins. Bureau v. Warwick (1976) 17 Cal.3d 190, in which the exclusion provided the liability policy did not apply to bodily injury "'to any insured.'" (At p. 193.) The court distinguished that language from the language in Jacober because it made clear the fact the exclusion applied to every insured. (Id., at p. 195.) Here

too, the language of the exclusion makes clear the persons to whom it applies.

Finally, defendants contend the family exclusion clause is a contract of adhesion, as such is unconscionable and should be rejected. This contention was not raised below, no evidence on the quesion was presented and the trial court did not consider it in ruling on the summary judgment motion. In reviewing a summary judgment, the apppellate court may copnsider only those factual questions before the trial court. (G & D Holland Construction Co. v. City of Marysville (1970) 12 Cal.App.3d 989, 997; Green v. Green (1963) 215 Cal.App.2d 37, 46.) Accordingly, we cannot consider this final issue.

II

Defendants further contend Charisse McGee's uninsured motorist coverage was in effect at the time of the accident. Again, we disagree.

June McGee first obtained an automobile insurance policy from plaintiff in 1963. On October 8, 1973, June signed an endorsement deleting uninsured motorist coverage from her policy number N739748. It provided: "By mutual agreement of the undersigned named insured and the Exchange, Uninsured Motorist Coverage . . . is deleted from the policy and any renewal thereof." At the time the endorsement took effect, Charisse was 12 years old. When Charisse came of legal age, she purchased a used Ford Mustang for herself and used her own money to insure it on June's policy, at that time number

K739748. Charisse was not informed by plaintiff she was subject to June's waiver of uninsured motorist coverage and was not asked for her own waiver of uninsured motorist coverage.

According to June's declarations, she graduated from law school in 1977. At that time she spoke to her insurance agent over the telephone and asked for an "entirely new policyf" with increased liability coverage; she also asked the uninsured motorist coverage be restored. "[U]nknown to her, the uninsured motorist coverage was not added to the policy declaration" but the 1973 endorsement deleting such coverage was applied. "The large increase in the premium due to the increased liability coverage obscured the fact that the new premium did not cover uninsured motorist." (Emphasis omitted.) The foregoing statements contradict the

statements in her and Charisse's response to plaintiff's request for admissions wherein they stated June's policy number K739748 did included uninsured motorist coverage and June paid premiums for such coverage.

The Automobile Renewal Declarations pages of June's policy number K739748 covering the period from October 10, 1982 to October 10, 1983, during which the accident took place, show June as the named insured with Charisse listed as an additional driver. A 1966 Mustang with an unmarried female owner/driver under age 18 is listed as one of the insured automobiles. A chart below is headlined: "LIMITS OF LIABILITY AND PREMIUMS COVERAGES ARE NOT IN EFFECT UNLESS A PREMIUM IS SHOWN." Premiums are then shown for all four atuomobiles listed on the policy for bodily injury liability, property damage liability and

fire and theft. No coverage or premiums are listed in the column marked "UNINSURED MOTORIST COVERAGE."

The trial court found it clear the policy was renewed from year to year and June's statement she asked for a new policy and that uninsured motorist coverage be added was conclusionary and did not consist of such necessary facts as when she made the request and the name of her agent. The trial court thus found, based on the 1973 endorsement signed by June, neither June nor Charisse was entitled to uninsured motorist benefits under the policy.

The question of waiver, which could involve a triable issue of fact, aside, there is another difficulty with payment of benefits under the uninsured motorist provision of the policy. Under that provision, plaintiff promised to "pay all sums under which a person insured

shall be legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury sustained by a person insured caused by accident and arising out of the ownership, maintenanace or use of an uninsured motor vehicle." Excluded are "damages because of bodily injury caused by a motor vehicle owned by [the named insured] or any resident of the household in which [the named insured] reside[s]."

It is undisputed no uninsured motor vehicle was involved in the accident; the only vehicle involved was the 1966 Mustang owned by Charisse and insured under June's policy with plaintiff. Thus, even if the waiver was invalid, the uninsured motorist provision did not cover Charisse's injujries.

In ruling on a summary judgment, this court is not bound by the

sufficiency of the trial court's stated reasons therefor. (Barnett v. Delta Lines, Inc. (1982) 137 Cal.App.3d 674, 682.) Rather, this court makes an independent review of the facts to determine whether the trial court's ruling was correct. (Bonus-Built. Inc. v. United Grocers, Ltd. (1982) 136 Cal.App.3d 429, 442.) Based on the provisions of the uninsured motorist coverage and the facts surrounding the accident, we conclude the trial court properly granted summary judgment to plaintiff on the ground defendants are not entitled to uninsured motorist benefits under the policy. The dispute as to the continued efficacy of the waiver of such benefits does not raise a triable issue of material fact as to entitlement to the benefits.

III

Finally, defendants assert plaintiff

has a duty to defend Pedersen. The assertion lacks merit.

After the accident, Charisse sued the County of Riverside, where the accident occurred; the county cross-complained against Pedersen. Charisse also sued Pedersen when he failed to pay her for the loss of her Mustang, as he had promised to do. Both cases were consolidated. Plaintiff provided Pedersen with counsel for his defense in both lawsuits subject to a reservation of rights based on a claim of noncoverage.

Plaintiff then filed the instant action for declaratory relief seeking, among other things, a declaration it has no duty to defend Pedersen on the cross-complaint filed against him by the County of Riverside. On plaintiff's first summary judgment motion, summary judgment was granted as to Pedersen

based upon his failure to oppose the motion. Defendants then moved for summary judgment and sought a ruling plaintiff had a duty to defend Pedersen. The trial court denied the motion and ruled defendants had no standing to make a motion on Pedersen's behalf. Plaintiff again moved for summary judgment against defendants; it obtained the summary judgment which is the subject of the instant appeal. Defendants, in their opposition to the motion, again raised the issue of plaintiff's duty to defend Pedersen. The trial court noted it thought the issue had been resolved by the earlier summary judgment but nonetheless resolved the issue once and for all by ruling plaintiff has no duty to defend Pedersen on the cross-complaint.

Part I of the insurance policy, covering liability for bodily injury,

obligates plaintiff to "defend . . . any suit claiming damages for bodily injury . . . if covered by [the] policy . . . ." Inasmuch as Charisse's damages for bodily injury are not covered by the policy, as discussed in part I, ante, plaintiff has no obligation to defend Pedersen against claims for such damages. (See California State Auto. Assn. Inter-Ins. Bureau v. Bourne (1984) 162 Cal.App.3d 89, 92-93.)

Defendants now seek to estop plaintiff from denying a duty to defend Pedersen based on plaintiff's prior defense of Pedersen. However, in view of the fact the prior defense was provided subject to a reservation of rights, there is no basis for applying the doctrine of estoppel.

Defendants also claim there was bad faith in the granting of the original summary judgment against Pedersen based

on the failure of his counsel, hired by plaintiff, to oppose the motion, and defendants have standing to raise this issue. Since, as concluded above, plaintiff in any event has no duty to defend Pedersen, the summary judgment properly was granted. (Barnett v. Delta Lines, Inc. supra, 137 Cal.App.3d at p. 682.)

The judgment is affirmed.

NOT TO BE PUBLISHED

SPENCER, P.J.

We concur:

DEVICH, J.

ORTEGA, J.

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2 Coverage for the insureds' medical expenses was available under the policy in the instant case but it was not selected.

App. B 36

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

Second Appellate District, Div. 1,
No. B033480
S010003

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

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INTERINSURANCE EXCHANGE AUTO CLUB OF SOUTHERN CALIFORNIA, Respondent

V.

CHARISSE MCGEE, Et Al., Appellants

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Appellant's petition for review DENIED

SUPREME COURT FILED
JUN 21, 1989
ROBERT WANDRUFF CLERK

[Signed] LUCAS

Chief Justice

## PROOF OF SERVICE

PETITION FOR CERTIORARI, CHARISSE MCGEE, DEFENDANT-PETITIONER, V. INTERINSURANCE EXCHANGE OF THE AUTO CLUB, PLAINTIFF-RESPONDENT

INTERINSURANCE EXCHANGE OF THE AUTO CLUB V. CHARISSE MCGEE, S 10003, B 33480; C573830

JUNE MCGEE, on oath deposes and states that on the 19th day of October, 19889, three copies of the Petition for a Writ of Certiorari were served by first class mail, postage prepaid, on the following persons:

GILBERT, KELLY, CROWLEY & JENNET, 1200 Wilshire Blvd., 6th Floor, Los Angeles, California 90017; (213) 580-7000;

Superior Court, Dept. 82, Judge M. Vogel, 111 S. Hill St., L.A., Calif. 90012;

Supreme Court of California, 3580

Wilshire Blvd., Rm. 213, L.A., CA 90010;

Court of Appeal, Second District, 3580 Wilshire Blvd., 3rd Floor, L.A., CA 90010.

All parties required to be served have been served.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

DATED: October 19, 1989,

June McGee

JUNE MCGEE, ATTORNEY FOR PETITIONER